



March 25, 2005

ENGROSSED SENATE BILL No. 96

DIGEST OF SB 96 (Updated March 23, 2005 4:42 pm - DI 69)

Citations Affected: IC 35-35; IC 35-37; IC 35-38; IC 35-50.

Synopsis: Sentencing. Replaces the fixed term of imprisonment for murder and other felonies with an advisory sentence to be used as a guideline sentence that a court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence that may be imposed for murder and other felonies. Makes conforming amendments.

Effective: Upon passage.

Long, Howard

(HOUSE SPONSORS — MESSER, CRAWFORD, FOLEY, KUZMAN)

January 4, 2005, read first time and referred to Committee on Corrections, Criminal, and Civil Matters.

February 24, 2005, reported favorably — Do Pass.

February 28, 2005, read second time, ordered engrossed. Engrossed.

March 1, 2005, read third time, passed. Yeas 49, nays 0.

HOUSE ACTION

March 14, 2005, read first time and referred to Committee on Courts and Criminal Code.

March 24, 2005, amended, reported — Do Pass.

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ES 96—LS 6238/DI 106+



March 25, 2005

First Regular Session 114th General Assembly (2005)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2004 Regular Session of the General Assembly.

ENGROSSED SENATE BILL No. 96

A BILL FOR AN ACT to amend the Indiana Code concerning criminal law and procedure.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 35-35-3-1 IS AMENDED TO READ AS
2 FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1. As used in this
3 chapter:

4 **"Advisory sentence" means the nonbinding guideline sentence**
5 **defined in IC 35-50-2-1.3.**

6 "Plea agreement" means an agreement between a prosecuting
7 attorney and a defendant concerning the disposition of a felony or
8 misdemeanor charge.

9 **"Presumptive sentence" means the penalty prescribed by IC 35-50-2**
10 **without consideration of mitigating or aggravating circumstances.**

11 "Prosecuting attorney" includes a deputy prosecuting attorney.

12 "Recommendation" means a proposal that is part of a plea
13 agreement made to a court that:

14 (1) a felony charge be dismissed; or

15 (2) a defendant, if ~~he~~ **the defendant** pleads guilty to a felony
16 charge, receive less than the ~~presumptive~~ **advisory** sentence.

17 "Victim" means a person who has suffered harm as a result of a

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1 crime.

2 SECTION 2. IC 35-37-2.5 IS ADDED TO THE INDIANA CODE
3 AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE
4 UPON PASSAGE]:

5 **Chapter 2.5. Aggravating Circumstances**

6 **Sec. 1. As used in this section, "aggravating circumstance"**
7 **means the following:**

8 (1) The harm, injury, loss, or damage suffered by the victim
9 of the offense was:

10 (A) significant; and

11 (B) greater than the elements necessary to prove the
12 commission of the offense.

13 (2) The person has a history of criminal or delinquent
14 behavior.

15 (3) The victim of the offense was less than twelve (12) years of
16 age or at least sixty-five (65) years of age.

17 (4) The person:

18 (A) committed a crime of violence (IC 35-50-1-2); and

19 (B) knowingly committed the offense in the presence or
20 within hearing of an individual who:

21 (i) was less than eighteen (18) years of age at the time the
22 person committed the offense; and

23 (ii) is not the victim of the offense.

24 (5) The person violated a protective order issued against the
25 person under IC 34-26-5 (or IC 31-1-11.5, IC 34-26-2, or
26 IC 34-4-5.1 before their repeal), a workplace violence
27 restraining order issued against the person under IC 34-26-6,
28 or a no contact order issued against the person.

29 (6) The person has recently violated the conditions of any
30 probation, parole, or pardon granted to the person.

31 (7) The victim of the offense was mentally or physically
32 infirm.

33 (8) The person was in a position having care, custody, or
34 control of the victim of the offense.

35 (9) The injury to or death of the victim of the offense was the
36 result of shaken baby syndrome (as defined in IC 16-41-40-2).

37 (10) The person threatened to harm the victim of the offense
38 or a witness if the victim or witness told anyone about the
39 offense.

40 (11) The person:

41 (A) committed trafficking with an inmate under
42 IC 35-44-3-9; and

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(B) is an employee of the penal facility.

SECTION 3. IC 35-38-1-7.1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 7.1. (a) In determining what sentence to impose for a crime, the court ~~shall~~ **may** consider **any aggravating circumstances.**

(1) the risk that the person will commit another crime;

(2) the nature and circumstances of the crime committed;

(3) the person's:

(A) prior criminal record;

(B) character; and

(C) condition;

(4) whether the victim of the crime was less than twelve (12) years of age or at least sixty-five (65) years of age;

(5) whether the person committed the offense in the presence or within hearing of a person who is less than eighteen (18) years of age who was not the victim of the offense;

(6) whether the person violated a protective order issued against the person under IC 34-26-5 (or IC 31-1-11.5; IC 34-26-2; or IC 34-4-5.1 before their repeal); a workplace violence restraining order issued against the person under IC 34-26-6; or a no contact order issued against the person; and

(7) any oral or written statement made by a victim of the crime.

(b) The court may consider the following factors as aggravating circumstances or as favoring imposing consecutive terms of imprisonment:

(1) The person has recently violated the conditions of any probation, parole, or pardon granted to the person.

(2) The person has a history of criminal or delinquent activity.

(3) The person is in need of correctional or rehabilitative treatment that can best be provided by commitment of the person to a penal facility.

(4) Imposition of a reduced sentence or suspension of the sentence and imposition of probation would depreciate the seriousness of the crime.

(5) The victim of the crime was less than twelve (12) years of age or at least sixty-five (65) years of age.

(6) The victim of the crime was mentally or physically infirm.

(7) The person committed a forcible felony while wearing a garment designed to resist the penetration of a bullet.

(8) The person committed a sex crime listed in subsection (e) and:

(A) the crime created an epidemiologically demonstrated risk of transmission of the human immunodeficiency virus (HIV)

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and involved the sex organ of one (1) person and the mouth;
 anus; or sex organ of another person;
 (B) the person had knowledge that the person was a carrier of
 HIV; and
 (C) the person had received risk counseling as described in
 subsection (g):

(9) The person committed an offense related to controlled
 substances listed in subsection (f) if:

(A) the offense involved:

(i) the delivery by any person to another person; or

(ii) the use by any person on another person;

of a contaminated sharp (as defined in IC 16-41-16-2) or other
 paraphernalia that creates an epidemiologically demonstrated
 risk of transmission of HIV by involving percutaneous contact;

(B) the person had knowledge that the person was a carrier of
 the human immunodeficiency virus (HIV); and

(C) the person had received risk counseling as described in
 subsection (g):

(10) The person committed the offense in an area of a
 consolidated or second class city that is designated as a public
 safety improvement area by the Indiana criminal justice institute
 under IC 36-8-19.5:

(11) The injury to or death of the victim of the crime was the
 result of shaken baby syndrome (as defined in IC 16-41-40-2):

(12) Before the commission of the crime, the person administered
 to the victim of the crime, without the victim's knowledge, a
 sedating drug or a drug that had a hypnotic effect on the victim;
 or the person had knowledge that such a drug had been
 administered to the victim without the victim's knowledge:

(13) The person:

(A) committed trafficking with an inmate under IC 35-44-3-9;
 and

(B) is an employee of the penal facility:

(14) The person committed the offense in the presence or within
 hearing of a person who is less than eighteen (18) years of age
 who was not the victim of the offense:

(c) (b) The court may consider the following factors as mitigating
 circumstances or as favoring suspending the sentence and imposing
 probation:

(1) The crime neither caused nor threatened serious harm to
 persons or property, or the person did not contemplate that it
 would do so.

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- (2) The crime was the result of circumstances unlikely to recur.
- (3) The victim of the crime induced or facilitated the offense.
- (4) There are substantial grounds tending to excuse or justify the crime, though failing to establish a defense.
- (5) The person acted under strong provocation.
- (6) The person has no history of delinquency or criminal activity, or the person has led a law-abiding life for a substantial period before commission of the crime.
- (7) The person is likely to respond affirmatively to probation or short term imprisonment.
- (8) The character and attitudes of the person indicate that the person is unlikely to commit another crime.
- (9) The person has made or will make restitution to the victim of the crime for the injury, damage, or loss sustained.
- (10) Imprisonment of the person will result in undue hardship to the person or the dependents of the person.
- (11) The person was convicted of a crime involving the use of force against a person who had repeatedly inflicted physical or sexual abuse upon the convicted person and evidence shows that the convicted person suffered from the effects of battery as a result of the past course of conduct of the individual who is the victim of the crime for which the person was convicted.

~~(d)~~ (c) The criteria listed in ~~subsections~~ **subsection (b) and (c)** do not limit the **matters aggravating circumstances or mitigating circumstances** that the court may consider in determining the sentence.

(d) A court may impose any sentence that is:

(1) authorized by statute; and

(2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances.

~~(e)~~ For the purposes of this article, the following crimes are considered sex crimes:

~~(1)~~ Rape (IC 35-42-4-1);

~~(2)~~ Criminal deviate conduct (IC 35-42-4-2);

~~(3)~~ Child molesting (IC 35-42-4-3);

~~(4)~~ Child seduction (IC 35-42-4-7);

~~(5)~~ Prostitution (IC 35-45-4-2);

~~(6)~~ Patronizing a prostitute (IC 35-45-4-3);

~~(7)~~ Incest (IC 35-46-1-3);

~~(8)~~ Sexual misconduct with a minor under IC 35-42-4-9(a);

~~(f)~~ For the purposes of this article, the following crimes are

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considered offenses related to controlled substances:

- (1) Dealing in or manufacturing cocaine, a narcotic drug, or methamphetamine (IC 35-48-4-1);
- (2) Dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2);
- (3) Dealing in a schedule IV controlled substance (IC 35-48-4-3);
- (4) Dealing in a schedule V controlled substance (IC 35-48-4-4);
- (5) Possession of cocaine, a narcotic drug, or methamphetamine (IC 35-48-4-6);
- (6) Possession of a controlled substance (IC 35-48-4-7);
- (7) Dealing in paraphernalia (IC 35-48-4-8.5);
- (8) Possession of paraphernalia (IC 35-48-4-8.3);
- (9) Offenses relating to registration (IC 35-48-4-14);

(g) For the purposes of this section, a person received risk counseling if the person had been:

- (1) notified in person or in writing that tests have confirmed the presence of antibodies to the human immunodeficiency virus (HIV) in the person's blood; and
- (2) warned of the behavior that can transmit HIV.

SECTION 4. IC 35-50-1-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 2. (a) As used in this section, "crime of violence" means:

- (1) murder (IC 35-42-1-1);
- (2) attempted murder (IC 35-41-5-1);
- (3) voluntary manslaughter (IC 35-42-1-3);
- (4) involuntary manslaughter (IC 35-42-1-4);
- (5) reckless homicide (IC 35-42-1-5);
- (6) aggravated battery (IC 35-42-2-1.5);
- (7) kidnapping (IC 35-42-3-2);
- (8) rape (IC 35-42-4-1);
- (9) criminal deviate conduct (IC 35-42-4-2);
- (10) child molesting (IC 35-42-4-3);
- (11) sexual misconduct with a minor as a Class A felony under IC 35-42-4-9(a)(2) or a Class B felony under IC 35-42-4-9(b)(2);
- (12) robbery as a Class A felony or a Class B felony (IC 35-42-5-1);
- (13) burglary as a Class A felony or a Class B felony (IC 35-43-2-1); or
- (14) causing death when operating a motor vehicle (IC 9-30-5-5).

(b) As used in this section, "episode of criminal conduct" means offenses or a connected series of offenses that are closely related in time, place, and circumstance.

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(c) Except as provided in subsection (d) or (e), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the:

(1) aggravating ~~and circumstances in IC 35-37-2.5-2; and~~

(2) mitigating circumstances in IC 35-38-1-7.1(b) and IC 35-38-1-7.1(c);

in making a determination under this subsection. The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the ~~presumptive~~ **advisory** sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

(d) If, after being arrested for one (1) crime, a person commits another crime:

(1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or

(2) while the person is released:

(A) upon the person's own recognizance; or

(B) on bond;

the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

(e) If ~~a court~~ **the factfinder** determines under IC 35-50-2-11 that a person used a firearm in the commission of the offense for which the person was convicted, the term of imprisonment for the underlying offense and the additional term of imprisonment imposed under IC 35-50-2-11 must be served consecutively.

SECTION 5. IC 35-50-2-1.3 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.3. (a) For purposes of sections 3 through 7 of this chapter, "advisory sentence" means a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence.**

(b) Except as provided in subsection (c), a court is not required to use an advisory sentence.

(c) In imposing:

(1) consecutive sentences in accordance with IC 35-50-1-2;

(2) an additional fixed term to an habitual offender under

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section 8 of this chapter; or

(3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;

a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

SECTION 6. IC 35-50-2-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. (a) A person who commits murder shall be imprisoned for a fixed term of ~~fifty-five (55) years, with not more than ten (10) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances.~~ **between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years.** In addition, the person may be fined not more than ten thousand dollars (\$10,000).

(b) Notwithstanding subsection (a), a person who was:

(1) at least eighteen (18) years of age at the time the murder was committed may be sentenced to:

(A) death; or

(B) life imprisonment without parole; and

(2) at least sixteen (16) years of age but less than eighteen (18) years of age at the time the murder was committed may be sentenced to life imprisonment without parole;

under section 9 of this chapter unless a court determines under IC 35-36-9 that the person is a mentally retarded individual.

SECTION 7. IC 35-50-2-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4. A person who commits a Class A felony shall be imprisoned for a fixed term of ~~thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances.~~ **between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years.** In addition, ~~he~~ **the person** may be fined not more than ten thousand dollars (\$10,000).

SECTION 8. IC 35-50-2-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 5. A person who commits a Class B felony shall be imprisoned for a fixed term of ~~ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances.~~ **between six (6) and twenty (20) years, with the advisory sentence being ten (10) years.** In addition, ~~he~~ **the person** may be fined not more than ten thousand dollars (\$10,000).

SECTION 9. IC 35-50-2-6 IS AMENDED TO READ AS

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FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 6. (a) A person who commits a Class C felony shall be imprisoned for a fixed term of ~~four (4) years; with not more than four (4) years added for aggravating circumstances or not more than two (2) years subtracted for mitigating circumstances.~~ **between two (2) and eight (8) years, with the advisory sentence being four (4) years.** In addition, ~~he~~ **the person** may be fined not more than ten thousand dollars (\$10,000).

(b) Notwithstanding subsection (a), if a person has committed nonsupport of a child as a Class C felony under IC 35-46-1-5, upon motion of the prosecuting attorney, the court may enter judgment of conviction of a Class D felony under IC 35-46-1-5 and sentence the person accordingly. The court shall enter in the record detailed reasons for the court's action when the court enters a judgment of conviction of a Class D felony under this subsection.

SECTION 10. IC 35-50-2-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 7. (a) A person who commits a Class D felony shall be imprisoned for a fixed term of ~~one and one-half (1 1/2) years; with not more than one and one-half (1 1/2) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances.~~ **between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years.** In addition, ~~he~~ **the person** may be fined not more than ten thousand dollars (\$10,000).

(b) Notwithstanding subsection (a), if a person has committed a Class D felony, the court may enter judgment of conviction of a Class A misdemeanor and sentence accordingly. However, the court shall enter a judgment of conviction of a Class D felony if:

(1) the court finds that:

(A) the person has committed a prior, unrelated felony for which judgment was entered as a conviction of a Class A misdemeanor; and

(B) the prior felony was committed less than three (3) years before the second felony was committed;

(2) the offense is domestic battery as a Class D felony under IC 35-42-2-1.3; or

(3) the offense is possession of child pornography (IC 35-42-4-4(c)).

The court shall enter in the record, in detail, the reason for its action whenever it exercises the power to enter judgment of conviction of a Class A misdemeanor granted in this subsection.

SECTION 11. IC 35-50-2-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 8. (a) Except as

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otherwise provided in this section, the state may seek to have a person sentenced as a habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions.

(b) The state may not seek to have a person sentenced as a habitual offender for a felony offense under this section if:

(1) the offense is a misdemeanor that is enhanced to a felony in the same proceeding as the habitual offender proceeding solely because the person had a prior unrelated conviction;

(2) the offense is an offense under IC 9-30-10-16 or IC 9-30-10-17; or

(3) all of the following apply:

(A) The offense is an offense under IC 16-42-19 or IC 35-48-4.

(B) The offense is not listed in section 2(b)(4) of this chapter.

(C) The total number of unrelated convictions that the person has for:

(i) dealing in or selling a legend drug under IC 16-42-19-27;

(ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);

(iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);

(iv) dealing in a schedule IV controlled substance (IC 35-48-4-3; and

(v) dealing in a schedule V controlled substance (IC 35-48-4-4);

does not exceed one (1).

(c) A person has accumulated two (2) prior unrelated felony convictions for purposes of this section only if:

(1) the second prior unrelated felony conviction was committed after sentencing for the first prior unrelated felony conviction; and

(2) the offense for which the state seeks to have the person sentenced as a habitual offender was committed after sentencing for the second prior unrelated felony conviction.

(d) A conviction does not count for purposes of this section as a prior unrelated felony conviction if:

(1) the conviction has been set aside;

(2) the conviction is one for which the person has been pardoned; or

(3) all of the following apply:

(A) The offense is an offense under IC 16-42-19 or IC 35-48-4.

(B) The offense is not listed in section 2(b)(4) of this chapter.

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(C) The total number of unrelated convictions that the person has for:

- (i) dealing in or selling a legend drug under IC 16-42-19-27;
- (ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);
- (iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);
- (iv) dealing in a schedule IV controlled substance (IC 35-48-4-3; and
- (v) dealing in a schedule V controlled substance (IC 35-48-4-4);

does not exceed one (1).

(e) The requirements in subsection (b) do not apply to a prior unrelated felony conviction that is used to support a sentence as a habitual offender. A prior unrelated felony conviction may be used under this section to support a sentence as a habitual offender even if the sentence for the prior unrelated offense was enhanced for any reason, including an enhancement because the person had been convicted of another offense. However, a prior unrelated felony conviction under IC 9-30-10-16, IC 9-30-10-17, IC 9-12-3-1 (repealed), or IC 9-12-3-2 (repealed) may not be used to support a sentence as a habitual offender.

(f) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing under IC 35-38-1-3.

(g) A person is a habitual offender if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated felony convictions.

(h) The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the **presumptive advisory** sentence for the underlying offense nor more than three (3) times the **presumptive advisory** sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years.

SECTION 12. IC 35-50-2-10 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 10. (a) As used in this section:

(1) "Drug" means a drug or a controlled substance (as defined in IC 35-48-1).

(2) "Substance offense" means a Class A misdemeanor or a felony in which the possession, use, abuse, delivery, transportation, or manufacture of alcohol or drugs is a material element of the

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crime. The term includes an offense under IC 9-30-5 and an offense under IC 9-11-2 (before its repeal). ~~July 1, 1991).~~

(b) The state may seek to have a person sentenced as a habitual substance offender for any substance offense by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated substance offense convictions.

(c) After a person has been convicted and sentenced for a substance offense committed after sentencing for a prior unrelated substance offense conviction, the person has accumulated two (2) prior unrelated substance offense convictions. However, a conviction does not count for purposes of this subsection if:

(1) it has been set aside; or

(2) it is a conviction for which the person has been pardoned.

(d) If the person was convicted of the substance offense in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing, under IC 35-38-1-3.

(e) A person is a habitual substance offender if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated substance offense convictions.

(f) The court shall sentence a person found to be a habitual substance offender to an additional fixed term of at least three (3) years but not more than eight (8) years imprisonment, to be added to the term of imprisonment imposed under IC 35-50-2 or IC 35-50-3. If the court finds that:

(1) three (3) years or more have elapsed since the date the person was discharged from probation, imprisonment, or parole (whichever is later) for the last prior unrelated substance offense conviction and the date the person committed the substance offense for which the person is being sentenced as a habitual substance offender; or

(2) all of the substance offenses for which the person has been convicted are substance offenses under IC 16-42-19 or IC 35-48-4, the person has not been convicted of a substance offense listed in section 2(b)(4) of this chapter, and the total number of convictions that the person has for:

(A) dealing in or selling a legend drug under IC 16-42-19-27;

(B) dealing in cocaine or a narcotic drug (IC 35-48-4-1);

(C) dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2);

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- 1 (D) dealing in a schedule IV controlled substance
 2 (IC 35-48-4-3); and
 3 (E) dealing in a schedule V controlled substance
 4 (IC 35-48-4-4);
 5 does not exceed one (1);

6 then the court may reduce the additional fixed term. However, the court
 7 may not reduce the additional fixed term to less than one (1) year.

8 (g) If a reduction of the additional year fixed term is authorized
 9 under subsection (f), the court may also consider the aggravating ~~or~~
 10 **circumstances in IC 35-37-2.5-2 and the** mitigating circumstances in
 11 IC 35-38-1-7.1 to:

- 12 (1) decide the issue of granting a reduction; or
 13 (2) determine the number of years, if any, to be subtracted under
 14 subsection (f).

15 SECTION 13. IC 35-50-2-11 IS AMENDED TO READ AS
 16 FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 11. (a) As used in
 17 this section, "firearm" has the meaning set forth in IC 35-47-1-5.

18 (b) As used in this section, "offense" means:

- 19 (1) a felony under IC 35-42 that resulted in death or serious
 20 bodily injury;
 21 (2) kidnapping; or
 22 (3) criminal confinement as a Class B felony.

23 (c) The state may seek, on a page separate from the rest of a
 24 charging instrument, to have a person who allegedly committed an
 25 offense sentenced to an additional fixed term of imprisonment if the
 26 state can show beyond a reasonable doubt that the person knowingly or
 27 intentionally used a firearm in the commission of the offense.

28 ~~(d) If after a sentencing hearing a court finds that a person who~~
 29 ~~committed an offense used a firearm in the commission of the offense;~~
 30 ~~the court may sentence the person to an additional fixed term of~~
 31 ~~imprisonment of five (5) years:~~

32 **(d) If the person was convicted of the offense in a jury trial, the**
 33 **jury shall reconvene to hear evidence in the enhancement hearing.**
 34 **If the trial was to the court, or the judgment was entered on a**
 35 **guilty plea, the court alone shall hear evidence in the enhancement**
 36 **hearing.**

37 **(e) If the jury (if the hearing is by jury) or the court (if the**
 38 **hearing is to the court alone) finds that the state has proved beyond**
 39 **a reasonable doubt that the person knowingly or intentionally used**
 40 **a firearm in the commission of the offense, the court may sentence**
 41 **the person to an additional fixed term of imprisonment of five (5)**
 42 **years.**

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SECTION 14. IC 35-50-2-13 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 13. (a) The state may seek, on a page separate from the rest of a charging instrument, to have a person who allegedly committed an offense of dealing in a controlled substance under IC 35-48-4-1 through IC 35-48-4-4 sentenced to an additional fixed term of imprisonment if the state can show beyond a reasonable doubt that the person knowingly or intentionally:

(1) used a firearm; or

(2) possessed a:

(A) handgun in violation of IC 35-47-2-1;

(B) sawed-off shotgun in violation of IC 35-47-5-4.1; or

(C) machine gun in violation of IC 35-47-5-8;

while committing the offense.

(b) If after a sentencing hearing a court finds that a person committed an offense as described in subsection (a), the court may sentence the person to an additional fixed term of imprisonment of not more than five (5) years, except as follows:

(1) If the firearm is a sawed-off shotgun, the court may sentence the person to an additional fixed term of imprisonment of not more than ten (10) years.

(2) If the firearm is a machine gun or is equipped with a firearm silencer or firearm muffler, the court may sentence the person to an additional fixed term of imprisonment of not more than twenty (20) years. The additional sentence under this subdivision is in addition to any additional sentence imposed under section 11 of this chapter for use of a firearm in the commission of an offense.

(b) If the person was convicted of the offense in a jury trial, the jury shall reconvene to hear evidence in the enhancement hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall hear evidence in the enhancement hearing.

(c) If the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person knowingly or intentionally committed an offense as described in subsection (a), the court may sentence the person to an additional fixed term of imprisonment of not more than five (5) years, except as follows:

(1) If the firearm is a sawed-off shotgun, the court may sentence the person to an additional fixed term of imprisonment of not more than ten (10) years.

(2) If the firearm is a machine gun or is equipped with a

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firearm silencer or firearm muffler, the court may sentence the person to an additional fixed term of imprisonment of not more than twenty (20) years. The additional sentence under this subdivision is in addition to any additional sentence imposed under section 11 of this chapter for use of a firearm in the commission of an offense.

SECTION 15. IC 35-50-2-14 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 14. (a) The state may seek to have a person sentenced as a repeat sexual offender for a sex offense under IC 35-42-4-1 through IC 35-42-4-9 or IC 35-46-1-3 by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated one (1) prior unrelated felony conviction for a sex offense under IC 35-42-4-1 through IC 35-42-4-9 or IC 35-46-1-3.

(b) After a person has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction under IC 35-42-4-1 through IC 35-42-4-9 or IC 35-46-1-3, the person has accumulated one (1) prior unrelated felony conviction. However, a conviction does not count for purposes of this subsection, if:

(1) it has been set aside; or

(2) it is one for which the person has been pardoned.

~~(c) The court alone shall conduct the sentencing hearing under IC 35-38-1-3.~~

(c) If the person was convicted of the offense in a jury trial, the jury shall reconvene to hear evidence in the enhancement hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall hear evidence in the enhancement hearing.

(d) A person is a repeat sexual offender if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person had accumulated one (1) prior unrelated felony conviction under IC 35-42-4-1 through IC 35-42-4-9 or IC 35-46-1-3.

(e) The court may sentence a person found to be a repeat sexual offender to an additional fixed term that is the ~~presumptive~~ **advisory** sentence for the underlying offense. However, the additional sentence may not exceed ten (10) years.

SECTION 16. **An emergency is declared for this act.**

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COMMITTEE REPORT

Madam President: The Senate Committee on Corrections, Criminal, and Civil Matters, to which was referred Senate Bill No. 96, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill DO PASS.

(Reference is made to Senate Bill 96 as introduced.)

LONG, Chairperson

Committee Vote: Yeas 10, Nays 0.

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COMMITTEE REPORT

Mr. Speaker: Your Committee on Courts and Criminal Code, to which was referred Senate Bill 96, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

Replace the effective date in SECTIONS 1 through 17 with "[EFFECTIVE UPON PASSAGE]".

Page 1, delete lines 1 through 17.

Page 2, delete lines 1 through 34.

Page 2, between lines 37 and 38, begin a new paragraph and insert:

"Advisory sentence" means the nonbinding guideline sentence defined in IC 35-50-2-1.3."

Page 2, strike line 41.

Page 2, line 42, strike "without consideration of mitigating".

Page 2, line 42, delete "circumstances,".

Page 2, line 42, strike "aggravating".

Page 3, line 1, delete "circumstances," and insert "circumstances:".

Page 3, line 1, delete "or a prior conviction.".

Page 3, line 7, strike "presumptive" and insert "advisory".

Page 3, line 13, delete "Determination of".

Page 3, delete lines 14 through 18.

Page 3, line 19, delete "Sec. 2." and insert "Sec. 1.".

Page 4, delete lines 15 through 42.

Page 5, delete lines 1 through 7.

Page 5, line 10, strike "shall" and insert "may".

Page 5, line 10, delete ":".

Page 5, line 11, delete "(1)".

Page 5, line 11, delete "found by the jury (in a case" and insert ".".

Page 5, run in lines 10 through 11.

Page 5, delete lines 12 through 16.

Page 7, line 35, after "matters" insert "aggravating circumstances or".

Page 7, between lines 36 and 37, begin a new paragraph and insert:

"(d) A court may impose any sentence that is:

(1) authorized by statute; and

(2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances."

Page 8, delete lines 25 through 37.

Page 9, line 22, after ";" insert "and".

Page 9, line 24, delete "and".

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Page 9, delete line 25.

Page 9, line 32, strike "presumptive" and insert "**advisory**".

Page 10, line 3, strike "a court" and insert "**the factfinder**".

Page 10, between lines 7 and 8, begin a new paragraph and insert:

"SECTION 5. IC 35-50-2-1.3 IS ADDED TO THE INDIANA CODE AS A **NEW SECTION** TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.3. (a) For purposes of sections 3 through 7 of this chapter, "advisory sentence" means a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence.**

(b) Except as provided in subsection (c), a court is not required to use an advisory sentence.

(c) In imposing:

- (1) consecutive sentences in accordance with IC 35-50-1-2;**
- (2) an additional fixed term to an habitual offender under section 8 of this chapter; or**
- (3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;**

a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense."

Page 10, line 10, strike "fifty-five (55)".

Page 10, strike line 11.

Page 10, line 12, strike "circumstances or".

Page 10, line 12, delete "a prior conviction, and".

Page 10, line 12, strike "not more than ten (10) years".

Page 10, line 13, strike "subtracted for mitigating circumstances." and insert "**between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years."**

Page 10, line 27, strike "thirty".

Page 10, strike line 28.

Page 10, line 29, strike "circumstances or".

Page 10, line 29, delete "a prior conviction, and".

Page 10, line 29, strike "not more than ten (10) years".

Page 10, line 30, strike "subtracted for mitigating circumstances." and insert "**between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years."**

Page 10, line 34, strike "ten".

Page 10, strike line 35.

Page 10, line 36, strike "circumstances or".

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Page 10, line 36, delete "a prior conviction, and".

Page 10, line 36, strike "not more than four (4) years".

Page 10, line 37, strike "subtracted for mitigating circumstances." and insert **"between six (6) and twenty (20) years, with the advisory sentence being ten (10) years."**

Page 10, line 41, strike "four".

Page 10, strike line 42.

Page 11, line 1, strike "circumstances or".

Page 11, line 1, delete "a prior conviction, and".

Page 11, line 1, strike "not more than two (2) years".

Page 11, line 2, strike "subtracted for mitigating circumstances." and insert **"between two (2) and eight (8) years, with the advisory sentence being four (4) years."**

Page 11, line 13, strike "one".

Page 11, strike line 14.

Page 11, line 15, strike "years added for aggravating circumstances or".

Page 11, line 15, delete "a prior conviction, and".

Page 11, line 16, strike "not more than one (1) year subtracted for mitigating circumstances." and insert **"between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years."**

Page 11, between lines 35 and 36, begin a new paragraph and insert:
"SECTION 11. IC 35-50-2-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 8. (a) Except as otherwise provided in this section, the state may seek to have a person sentenced as a habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions.

(b) The state may not seek to have a person sentenced as a habitual offender for a felony offense under this section if:

(1) the offense is a misdemeanor that is enhanced to a felony in the same proceeding as the habitual offender proceeding solely because the person had a prior unrelated conviction;

(2) the offense is an offense under IC 9-30-10-16 or IC 9-30-10-17; or

(3) all of the following apply:

(A) The offense is an offense under IC 16-42-19 or IC 35-48-4.

(B) The offense is not listed in section 2(b)(4) of this chapter.

(C) The total number of unrelated convictions that the person has for:

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- (i) dealing in or selling a legend drug under IC 16-42-19-27;
- (ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);
- (iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);
- (iv) dealing in a schedule IV controlled substance (IC 35-48-4-3; and
- (v) dealing in a schedule V controlled substance (IC 35-48-4-4);

does not exceed one (1).

(c) A person has accumulated two (2) prior unrelated felony convictions for purposes of this section only if:

- (1) the second prior unrelated felony conviction was committed after sentencing for the first prior unrelated felony conviction; and
- (2) the offense for which the state seeks to have the person sentenced as a habitual offender was committed after sentencing for the second prior unrelated felony conviction.

(d) A conviction does not count for purposes of this section as a prior unrelated felony conviction if:

- (1) the conviction has been set aside;
- (2) the conviction is one for which the person has been pardoned; or
- (3) all of the following apply:
 - (A) The offense is an offense under IC 16-42-19 or IC 35-48-4.
 - (B) The offense is not listed in section 2(b)(4) of this chapter.
 - (C) The total number of unrelated convictions that the person has for:

- (i) dealing in or selling a legend drug under IC 16-42-19-27;
- (ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);
- (iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);
- (iv) dealing in a schedule IV controlled substance (IC 35-48-4-3; and
- (v) dealing in a schedule V controlled substance (IC 35-48-4-4);

does not exceed one (1).

(e) The requirements in subsection (b) do not apply to a prior unrelated felony conviction that is used to support a sentence as a habitual offender. A prior unrelated felony conviction may be used under this section to support a sentence as a habitual offender even if the sentence for the prior unrelated offense was enhanced for any reason, including an enhancement because the person had been

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convicted of another offense. However, a prior unrelated felony conviction under IC 9-30-10-16, IC 9-30-10-17, IC 9-12-3-1 (repealed), or IC 9-12-3-2 (repealed) may not be used to support a sentence as a habitual offender.

(f) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing under IC 35-38-1-3.

(g) A person is a habitual offender if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated felony convictions.

(h) The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the ~~presumptive~~ **advisory** sentence for the underlying offense nor more than three (3) times the ~~presumptive~~ **advisory** sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years."

Page 13, line 11, delete ", " and insert "**and**".

Page 13, line 12, delete ", and the existence of a prior unrelated conviction".

Page 15, line 35, strike "presumptive" and insert "**advisory**".

Page 15, after line 37, begin a new paragraph and insert:

"SECTION 16. **An emergency is declared for this act.**".

Renumber all SECTIONS consecutively.

and when so amended that said bill do pass.

(Reference is to SB 96 as printed February 25, 2005.)

ULMER, Chair

Committee Vote: yeas 11, nays 0.

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